United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

176

No. 24,551

UNITED STATES OF AMERICA,

Appellee,

v.

CLARENCE B. JENKINS,

Appellant.

Appeal from the District Court
for the District of Columbia

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a criminal conviction, after jury trial, in the United States District Court for the District of Columbia. Leave to appeal in forma pauperis has been granted. This Court has jurisdiction under 28 U.S.C. §1291.

TABLE OF CONTENTS

TABLE OF CASES

* Cases chiefly relied upon.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether defendant's motion for acquittal on the rape charge should have been granted on the grounds that the government failed to corroborate the testimony of the complaining witness on the corpus delicti.

2. Whether the trial judge adequately charged the jury when it failed to instruct the jury with sufficient particularity and succinctness that it was necessary for the government to corroborate the complaining witness's testimony that there had been penetration of the sexual organ of the female by the sexual organ of the male.

   a. Whether such failure constituted plain error affecting substantial rights of the defendant.

[This case has not previously been before this Court.]

Reference to Ruling: Denial of motion for acquittal (Transcript page :588)

STATEMENT OF THE CASE

Appellant was charged in the District Court Criminal Case No. 1783-68, with carnal knowledge of a female named Annie M. Woodson, forcibly and against her will, in violation of 22 D.C. Code, Section 2801 (Rape). On July 11, 1969, appellant entered a plea of not guilty. Following a trial, the jury found appellant guilty of committing rape in violation of 22 D.C. Code, Section 2801. On July 15, 1970, appellant was sentenced to four to twelve years, judgment being entered on July 17, 1970. Appellant's Notice of Appeal was filed on July 15, 1970. Present counsel for the appellant was appointed by the United States Court of Appeals for the District of Columbia Circuit on September 21, 1970.

THE TESTIMONY

1. The Testimony of the Complainant, Mrs. Woodson

Annie M. Woodson testified that at 2:30 A.M. on the morning of September 1, 1968, she had just returned from a birthday party at a house about one block from her own house which is at 403 Upshur Street, N.W., Washington,

D. C. (Tr. 114). She was having difficulty getting the key into the door lock when she turned around and saw a man, who was later identified as the defendant, on the top of the steps leading to her house (Tr. 116). Thereupon, the defendant tore her blouse off, and Mrs. Woodson began to struggle with him (Tr. 116, 117). Mrs. Woodson stated that she repeatedly hit the defendant with her keys and continued screaming until he grabbed her throat with his hand (Tr. 117). At this point, the defendant told her to lie down, and she did so (Tr. 118).

Mrs. Woodson then testified that the defendant at first had some difficulty with the act of penetration, but that eventually penetration was achieved (Tr. 118, 119, 126, 129). During the preliminary hearing, the complainant stated in answer to an inquiry of why she was certain the defendant made penetration:

> "Well, he tried the first time and he couldn't and he was -- he kept on trying the second time and he couldn't, so the reason why I figured he made his penetration because he had yanked on my bra, see he had yanked on my bra on my neck and that is after he had done it."
>
> (Tr. 128)

During the trial Mrs. Woodson again re-iterated that penetration had taken place because she could feel him inside her (Tr. 129).

At this point, the defendant saw that a police car was going by and successfully prevented Mrs. Woodson from screaming by maintaining a grip on her throat (Tr. 120). The time elapsed, from the beginning of the struggle until after the police car went by, was fifteen minutes (Tr. 120). The defendant then let Mrs. Woodson get up so they could go in the house, and she began screaming since she saw a police car (Tr. 120). The defendant knocked her down and then ran away (Tr. 120).

Later two police officers returned with the defendant, and Mrs. Woodson identified him as the man who attacked her, noting that there were bloody scratches on his neck where she had struck him with her keys (Tr. 121). Mrs. Woodson testified that the defendant's face had been from six inches (Tr. 124) to fourteen or fifteen inches (Tr. 125) from hers during the attack.

When asked whether the defendant had injured her in the vaginal area, the plaintiff replied at Tr. 123: "Well, I was sore ... in the lower part of my stomach...."

2. The Testimony of Police Officer Maurice Hall

Officer Hall testified that he had been dispatched to the vicinity of 403 Upshur Street, N.W., in the early morning hours of September 1, 1968 (Tr. 154). He stated that he had made a search of the area and had found nothing abnormal; but that he continued to search the area and had returned to the 400 block of Upshur Street (Tr. 154). Upon his return he used a spotlight observing different houses in the block and finally coming to 403 Upshur Street (Tr. 155). When the spotlight was placed on the porch of this house, he observed a man identified as the defendant running from the porch of the house and at the same time he heard a scream coming from the porch (Tr. 155). Officer Hall stated that he hollered at the man, identifying himself as a police officer, and told him to stop but to no avail (Tr. 156). The fugitive, however, ran into the arms of a second policeman, Officer Patterson, who apprehended him approximately 25 to 30 feet from Mrs. Woodson's house (Tr. 156). Officer Hall observed that the defendant was perspiring heavily, his clothes were disarranged, and a

number of bleeding lacerations were on his face and neck (Tr. 159). The two policemen then brought the defendant back to the house of Mrs. Woodson who walked out to the sidewalk and identified him as the one who had attacked her (Tr. 159, 120, 121). When asked what Mrs. Woodson's condition was at that time, Mr. Hall replied, "She was dressed in ladies' slacks and brassier." (Tr. 160) There was no testimony as to whether she was distraught or hysterical.

3. The Stipulated Testimony of Dr. Beck

A physical examination of the complainant, Mrs. Woodson, age 47, took place at 4:35 A.M. on September 1, 1968, the morning of the alleged rape (Tr. 145). A general physical examination revealed that the complainant had a bruise on her skull, the skin of her neck was broken and bruised, and her elbow was scraped (Tr. 145). A gynecological examination indicated that no hymen was found (Tr. 145). Under the mental health evaluation, the doctor found that the complainant appeared normal (Tr. 145). When asked on his report, "in your opinion is the above evidence compatible with forced vaginal intercourse?", the doctor checked the box that indicates

that he was unable to determine the answer to that question (Tr. 145). The doctor made a test for sperm in the vaginal area, which test consisted of taking a smear from three different places in the vagina, the uterus, and the cervix and in a general saline solution (Tr. 145). The smears were given to a laboratory, and the laboratory found no sperm (Tr. 145).

4. The Testimony of Miss Norma Hull

On the night of August 31st Miss Hull testified that she went out with her cousin, Mrs. Emily Bryson, to a club on Georgia Avenue, N.W., in Washington, D. C. (Tr. 67, 68). She testified that neither she nor her cousin had any alcoholic drinks (Tr. 68). On the way home, the witness testified that they were followed by a man identified as the defendant (Tr. 69). The defendant approached and said hello (Tr. 70) and then continued to follow them from a distance of about 12 feet (Tr. 71). He caught up with the two girls at the corner of New Hampshire and Upshur and asked where they had been (Tr. 72). Then he asked whether they were married, and both replied that they were happily married (Tr. 72, 73). The defendant then asked whether he could walk them up the street, and at this time he put his hand upon Miss Hull's

shoulder (Tr. 73). Seeing that the girls were apparently not very interested in his company, the defendant made the statement that the girls were probably out here themselves looking for something, called them whores, and then proceeded to walk down 5th Street toward the corner of 5th and Upshur Streets (Tr. 74).

The witness testified that her home was on the southeast corner of 4th and Upshur Streets, and that the complainant's home was on the opposite side of Upshur Street -- two houses down (Tr. 76, 77). She stated that she and her cousin continued to their home and that sometime afterwards they heard screams coming from what they determined to be the home of Mrs. Woodson -- across the street. They then called the police (Tr. 83). They saw the police car come into the area and patrol Upshur Street and then they saw it leave (Tr. 83, 84). When they heard more screams coming from the house, the mother of Miss Hull called the police a second time (Tr. 84). They then saw someone run down the front steps of Mrs. Woodson's house, and they heard a policeman, who had just arrived, tell the man to stop (Tr. 84). The man did not stop but continued running away (Tr. 85). Miss Hull then stated that she and her cousin went outside to find that the police had apprehended the fugitive and that he was handcuffed in a nearby alley (Tr. 85). She

testified that there was blood on his shirt and his chin (Tr. 89). Both the girls recognized this man as the one who had approached them earlier in the evening (Tr. 85, 86) and further identified the man as the defendant (Tr. 86). She further testified that she did not know Mrs. Woodson, the complainant (Tr. 76), and that she did not see Mrs. Woodson at all that night (Tr. 89).

5. The Testimony of Mrs. Emily Bryson

In general, the testimony of Mrs. Bryson was much the same as that given by her cousin, Norma Hull, whom she had accompanied the morning of September 1, 1968, when the events related above took place. Mrs. Bryson stated that she and her cousin had been approached by a man identified as the defendant on the way home from a club (Tr. 96) and that he had asked then whether they were married (Tr. 97) to which they had answered yes (Tr. 97). She stated that the man had asked whether they would allow him to walk them home and that they had replied no (Tr. 99). The period of time that elapsed in this entire encounter with the defendant was a total of 5 minutes (Tr. 100). Mrs. Bryson testified further that some time later after the two had returned home they heard loud screams (Tr. 100). After phoning the police, they

saw a police car come into and then leave the area. Whereupon the aunt called the police again (Tr. 100). A police car then pulled up across the street (Tr. 100). The officer in the car got out and yelled "Halt" to the defendant who was seen running from the porch (Tr. 101).

6. The Testimony of The Defendant-Appellant, Clarence Jenkins

The testimony of Clarence B. Jenkins indicated that on August 31, 1968, he had consumed a considerable amount of alcoholic beverages -- first, about a pint of scotch at a wedding reception (Tr. 299 and 302), then at a friend's house where he drank about a pint of rum (Tr. 300) and finally at his brother's home where he had some wine (Tr. 301). He left his brother's house about 1:30 A.M. (on September 1, 1968) and went by [illegible] to a night-club on Georgia Avenue (Tr. 302, 303). Mr. Jenkins testified further that he met a girl at the nightclub and that he walked her home to her apartment on Upshur Street (Tr. 303). The witness made it clear that this girl was neither Mrs. Emily Bryson nor Miss Norma Hull, who had testified that they had been approached by the defendant in the early morning hours of September 1, 1968 (Tr. 320). After leaving

the girl at the door of her apartment, Mr. Jenkins got involved in a fight (Tr. 303). The defendant maintains that the fight caused scars on his neck (Tr. 303). After he got away from the fight, he was arrested (Tr. 304). The first time the defendant claims to have seen the complainant was before he was taken on a "lineup" (Tr. 328).

DEFENDANT'S MOTION FOR ACQUITTAL

At the conclusion of the government's case, the defendant's attorney moved for a judgment of acquittal on the grounds that there was a lack of corroborating evidence on the act of penetration which is a necessary element of rape (Tr. 384-385). This motion was renewed at the conclusion of the trial (Tr. 586). The trial court then denied the motion (Tr. 588).

THE COURT'S JURY INSTRUCTIONS

At the time the jury instructions were discussed, defendant's counsel stated at Tr. 586, "I would like to make a motion that corroboration of penetration is a necessary element of proof of rape." Whether this

"motion" was a renewal of the motion for acquittal which the court did not act upon at Tr. 385 or simply a request for a clear jury instruction to the effect that the act of penetration must be corrorborated is not certain.

The instructions of the trial court set forth, inter alia, the essential elements of the offense of rape which are (1) that the defendant had sexual intercourse with the complainant and (2) that the act was committed forcibly and against the will of the complainant (Tr. 616). To establish the element of sexual intercourse, the trial court explained at Tr. 619:

> "there must have been penetration of the sexual organ of the female by the sexual organ of the male. The slightest penetration is sufficient, and emission is not necessary."

With respect to the necessity of corroboration, the trial court stated at Tr. 619-620 as follows:

> "The law does not permit a conviction of rape on the basis of the testimony of the complaining witness standing alone. Corroboration of her testimony is required. To the extent to which you may find that the testimony of the complaining witness is not corroborated in the manner required by law, you may not consider her testimony as evidence in this case. Before you may consider the testimony of the complainant as evidence on the matter of what is known

as corpus delicti you must find that her testimony in this regard has been corroborated. The corpus delicti means the fact that a crime has been committed. In a case of rape, the corpus delicti is the occurrence of an act of sexual intercourse with a female forcibly and against her will. You may not find that such offense occurred solely on the basis of the testimony of the complainant.

Before you may consider the testimony of the complaining witness as evidence on the matter of the identity of the defendant as the person who committed the offense, you must find that her testimony in this regard has also been corroborated. You may not find that the defendant committed the alleged offense solely on the basis of the testimony of the complainant.

This requirement of corroboration means that there must be evidence, independent of the testimony of the complainant, of facts or circumstances which tend to support the testimony given by the complainant. This evidence may be direct or circumstantial or both."

ARGUMENT

1. Defendant's Motion For Acquittal On The Charge Of Rape Should Have Been Granted Because The Government Failed To Sustain Its Burden Of Corroborating The Testimony Of The Complaining Witness

With respect to the above argument, the Court is requested to read the following pages of the transcript: 67-77; 79-89; 95-102; 114-129; 154-159; 145; 299-304; and 320.

Nearly three hundred years ago, Lord Hale stated in 1 Pleas of the Crown 633, 635 (1680):

> "It is true, rape is a most detestible crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved: and harder to be defended by the party accused, though never so innocent."

It is clearly the law of this jurisdiction that no person may be convicted of rape on the uncorroborated testimony of the alleged victim; as a general rule, corroboration is required as to both (1) the corpus delicti and (2) the identity of the accused. Allison v. United States, 133 U.S. App. D.C. 159, 162, 409 F.2d 445, 448 (1969); Coltrane

v. United States, 135 U.S. App. D.C. 295, 298-301, 418 F.2d 1131, 1134-37 (1969). Accord, Bailey v. United States, 132 U.S. App. D.C. 82, 87, 405 F.2d 1352, 1357 (1968): Borum v. United States, 133 U.S. App. D.C. 147, 152, 409 F.2d. 433, 438 (1967), cert. den., 395 U.S. 916 (1969): McGuinn v. United States, 89 U.S. App. D.C. 197, 198, 191 F.2d 477, 478 (1951).

The corroboration need not consist of the testimony of an eye-witness: rather, it may consist of circumstances which tend to support the complainant's story. Coltrane v. United States, supra at 301, 418 F.2d at 1137: Allison v. United States, supra at 162, 409 F.2d at 448. Under certain circumstances, the requirement of corroboration as to the identity of the accused may be somewhat relaxed; however, the Court has never diluted the requirement that the corpus delicti be corroborated. Coltrane v. United States, supra at 299-300, 418 F.2d at 1135-36; Allison v. United States, supra at 163, 409 F.2d at 449.

Suffice it to say, in each case, the corroboration must be evaluated on its own merits. Coltrane v. United States, supra at 301, 418 F.2d at 1137: Bailey v. United States, supra at 88, 405 F.2d at 1358. An examination of the cases, however, shows that in almost every

instance there was more convincing evidence of the act of penetration than present in the instant case. It is well established that in a rape case the prosecution must establish the fact of sexual intercourse (that is, penetration of the female sexual organ by the sexual organ of the male) forcibly and against the will of the complainant. United States v. Bryant, 137 U.S. App. D.C. 124, 131, 420 F.2d 1327, 1334 (1969).

In McGuinn v. United States, supra, appellant's conviction of rape was affirmed after examining appellant's contention that there was insufficient corroboration of the corpus delicti. The complainant reported the attack to the nearest available person after she freed herself from the appellant. She was in a nervous and crying condition at the time she reported the attack to a total stranger. The appellant was found, as described by the complaining witness, in the front seat of an automobile with his pants and shorts down. Finally, the appellant admitted the intercourse in writing although he subsequently denied it at trial. In the present case, appellant was not found with his pants and shorts down nor was there any admission of intercourse.

In Franklin v. United States, 117 U.S. App. D.C. 331, 330 F.2d 205 (1964) fingerprints of two of the defendants were found on the car and medical evidence confirmed that the victim had been savagely raped. Medical evidence in the present case is inconclusive (Tr. 145).

In Borum v. United States, supra, the record disclosed an abundance of independent evidence corroborating the complainant. Sperm was found not only in the complainant's vagina but also on her underclothing. The complainant reported that she had been raped to the laundryman at the house and to both her husband and the police by telephone as soon as the appellant departed. The laundryman observed the complainant standing, completely nude, with a telephone in her hand, reporting the event to her husband and the police. The laundryman also found the complainant was hysterical, and an examining physician later found the complainant to be quite tense and upset. The appellant's fingerprints were also found at the scene. In the present case, a medical examination was inconclusive as to whether any forced intercourse had taken place in the present case (Tr. 145). The complainant was not hysterical. The examining physician found the complainant's mental health evaluation to be normal (Tr. 145).

In Bailey v. United States, supra, this Court concluded that a reasonable jury could find, notwithstanding the lack of direct medical evidence concerning a sexual attack, that an attack did occur based upon the testimony of Mrs. Johnson, the fingerprints on the light, a prompt report of the incident, and the testimony of all other witnesses as to the distraught physical condition of the complainant immediately after the alleged rape. The complainant's mother testified as to the presence of semen on the complainant's body. Again, in the present case, there is absolutely no evidence of semen, nor was the complainant found to be distraught.

In Coltrane v. United States, supra, this Court found that the government's evidence was insufficient to corroborate the complainant's testimony as to the first six counts of the indictment which included counts of taking indecent liberties with a child and counts of sodomy. However, as to the seventh count of the indictment, relating to taking indecent liberties with a child, this Court found that the government's presentation was considerably more formidable, since the complainant came down with gonorrhea. This Court thus remanded the case for a new trial on the seventh count. In the present case, there is no evidence that the complainant became pregnant or contracted any disease from the appellant.

Finally, in Washington v. United States, 136 U.S. App. D.C. 54, 419 F.2d 636 (1969), this Court found that there was sufficient circumstantial evidence to corroborate the complainant's testimony as to the corpus delicti, compensating for the lack of clear medical evidence of forcible penetration. The reported case cites the fact that the victim's escort held at knife point by the appellant's companion, did not see the rape but did hear the complainant's screams and later saw her on the ground with her clothing in disarray. Other witnesses testified that the complainant's lip was cut and bleeding and that she was upset and crying. The rape was promptly reported to friends and to the police. The facts of this case also showed that a tampon, which the complainant was using because she was in her menstrual period, was displaced back into the posterior corner of her vagina (Washington transcript at 171; brief for appellant in Appeal No. 21451 at page 28.) In the present case there is no displaced tampon or other equally convincing circumstantial evidence.

Comparing these cases to the instant case, it is apparent that the government has failed to sustain its burden of proof. In the present case, consider the corroborating testimony of the corpus delicti. The defendant

(appellant) was seen running from the complainant's porch (Tr. 158) and his condition at the time of apprehension was observed by officer Hall as follows at Tr. 159:

> "Mr. Jenkins was perspiring heavily. His clothes were disarranged. His shirt was hanging out of his pants. He had numerous lacerations to the neck area and his face. The lacerations were bleeding at the time of arrest."

Officer Hall returned the defendant to the complainant's home where she identified him (Tr. 159). When asked to describe the condition of the complainant when officer Hall returned to her house with the defendant, he stated at Tr. 160: "She was dressed in ladies' slacks and brassier." Consider also the medical examination. The doctor found no hymen (Tr. 145) which is not unusual for a 47 year old married woman. A bruise was found on her skull, the skin of her neck was broken and bruised: and her elbow was scraped (Tr. 145). Her mental health examination showed that she appeared normal, the examination having taken place less than two hours after the alleged rape (Tr. 145, 115). Finally, no sperm was found in various tests and the doctor was unable to determine whether there had been forced vaginal intercourse (Tr. 145). Absolutely none of this

testimony corroborates the act of penetration. In fact, testimony to the effect that Mrs. Woodson appeared normal, was found with her pants on, and the lack of sperm corroborate the fact that no penetration occurred.

The only other "corroborating" evidence came from Miss Norma Hull and Mrs. Emily Bryson who heard screams from the vacinity of the Woodson house. Mrs. Brysson was Miss Hull's cousin and was staying with Miss Hull that night (Tr. 67). Significantly these witnesses never saw Mrs. Woodson that night (Tr. 89) and they merely observed the defendant bleeding from the mouth (Tr. 89). Again this testimony certainly doesn't corroborate the act of penetration.

In summary, it can hardly be said that these facts establish that there was penetration of the female sexual organ by the sexual organ of the male. Unlike many of the cases above, the complainant was not in a nervous and crying condition: no medical evidence of pregnancy was introduced; no presence of sperm was noted: no admission of intercourse was given: and no displaced tampon was noted. A jury might reasonably find that <u>something</u> had occurred at the time and place in question: but that it was rape, i.e., penetration by force, depended entirely upon the complainant's own testimony.

Accordingly, the government failed to sustain its burden of proof of proving an essential element of the crime of rape. Under these circumstances, the trial court should have followed the procedure which was followed by the trial court in Whittaker v. United States, 108 U.S. App. D.C. 268, 281 F.2d 631 (1960), where the trial judge found the evidence insufficient to support the charge of carnal knowledge but submitted to the jury the lesser included offense of assault with intent to commit carnal knowledge. In the present case, the trial court should have granted defendant's motion for acquittal, and his conviction should now be reversed. Alternatively, at the very least, defendant is entitled to a reversal of the guilty verdict on the charge of rape and a remand of this case for a new trial, if requested by the government, on the lesser included offense, namely, assault with intent to commit rape or simple assault.

If the ruling of the trial court was affirmed by this Court, it would mean that testimony corroborating solely the act of assault with intent to rape or assault would be sufficient to sustain a conviction of rape. The difference in ultimate penalty between assault or assault with intent to rape and rape per se is indicative of the necessity to corroborate each and every element of the offense of rape.

The trial court should never dilute this corroborative requirement. If corroboration of each and every element is not present, the case should be submitted to the jury on the lesser included offense. It is recognized that medical testimony is not absolutely necessary for corroboration. It is further recognized that corroboration of the act of penetration is quite difficult. Nevertheless, the difficulty of corroboration should never deter the trial court from a strict application of the principles governing proof in rape cases. The dangers to society of permitting the act of penetration to be proved by the testimony of the prosecutrix alone far outweigh the dangers to society of presenting a case to the jury on the lesser included offense of assault with intent to rape rather than rape itself. Finally, the trial court must use diligence to exercise its duty to acquit the defendant of rape if the testimony of the complainant on all elements is not corroborated.

2. The Trial Judge Did Not Instruct The Jury With Sufficient Particularity And Succinctness On The Necessity Of Corroborating The Complainant's Testimony On The Corpus Delicti

With respect to the above argument, the Court is requested to read the following pages of the transcript: 586-588 and 618-626.

The trial court's instructions, when examined from the record by a lawyer, are complete; nevertheless, it is contended that greater explicitness for the benefit of the jury is required with respect to the necessity of corroboration. The trial court succinctly points out the elements of rape at Tr. 619; yet this explicitness is lacking when it comes to the corroboration necessity. The trial court states at Tr. 620:

> "Before you may consider the testimony of the complainant as evidence on the matter of what is known as corpus delicti you must find that her testimony in this regard has been corroborated."

The trial court then explained what the term "corpus delicti" meant at Tr. 620:

> "The corpus delicti means the fact that a crime has been committed. In a case of rape, the corpus delicti is the occurrence of an act of sexual intercourse with a female forcibly and against her will. You may not find that such offense occurred solely on the basis of the testimony of the complainant."

It is submitted that the trial court should have repeated each and every element and explained to the jury that there must be corroboration of element A and corroboration of element B and so on before the defendant could be found guilty of the offense.

Defendant's attorney stated at Tr. 586, "I would like to make a motion that corroboration of penetration is a necessary element of proof of rape." However, it is also acknowledged that defendant's attorney stated he was satisfied with the charge of the jury (Tr. 626).

a. The Trial Court's Failure Constitued Plain Error

The only way an instruction not objected to may be viewed as prejudicial by this Court is if it constitutes plain error "affecting substantial rights" within Fed. R. Crim. P. 52(b). Lopez v. United States, 373 U.S. 427, 436 (1963). Howard v. United States, 128 U.S. App. D.C. 336, 339, 389 F.2d 287, 290 (1967); United States v. Howard, No. 23,553, decided July 31, 1970 at p. 8.

The lack of greater explicitness was plain error in light of the complete record. Although it is strongly contended that the decision in this case is not close and the defendant should be acquitted of rape, the trial court clearly had a greater duty to charge the jury with extreme explicitness if the question of rape was submitted to the jury. Accordingly, this Court shall review the above charge with meticulousness and reverse the conviction of rape if there wasn't sufficient explicitness in these instructions.

CONCLUSION

For the foregoing reasons, the jury verdict should be set aside and the defendant should be acquitted or, alternatively, at the very least, this proceeding should be remanded for a new trial consistent with the arguments made and authorities cited above.

Respectfully submitted,

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(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,551

UNITED STATES OF AMERICA, APPELLEE

v.

CLARENCE B. JENKINS, APPELLANT

Appeal from the United States District Court for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
ROBERT S. TIGNER,
Assistant United States Attorneys.

Cr. No. 1783-58

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED*

In the opinion of appellee the following issue is presented:

Was there sufficient corroborative evidence of the *corpus delicti* to support appellant's conviction for rape?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,551

UNITED STATES OF AMERICA, APPELLEE

v.

CLARENCE B. JENKINS, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By an indictment filed November 6, 1968, appellant was charged with raping Mrs. Annie M. Woodson in violation of 22 D.C. Code § 2801. On April 20, 1970, he appeared before Judge June L. Green and a jury for trial, and on April 24 he was found guilty of rape. On July 15, 1970, appellant was sentenced to serve four to twelve years' imprisonment. This appeal followed.

At about 1:30 a.m. on September 1, 1968, Norma Hull, then twenty-one years old, and her cousin, Emily Bryson, began walking home from a discotheque night club located near the intersection of Georgia and New Hampshire

Avenues, N.W.[1] Proceeding north on New Hampshire Avenue, they passed appellant, whom they had never seen before, and returned his greeting, "hello," as they walked by (Tr. 67-68, 70-71, 95-97). At Upshur Street they noticed that appellant was following only about twelve feet behind them (Tr. 71, 97). They quickened their pace (Tr. 72). Then, placing a hand on each of their shoulders, appellant asked where they had been and whether they were married (Tr. 72, 98). Jerking away, the women stated that they were married and en route home to their families (Tr. 72-73, 97-98). They declined appellant's offer to accompany them and resumed walking on Upshur Street (Tr. 73, 99). When appellant turned south on 5th Street, they hastened home (Tr. 81). Throughout this encounter of five to ten minutes' duration, appellant's behavior was normal, and no odor of liquor was noticeable (Tr. 82, 87, 104). He wore dark trousers and a white shirt (Tr. 70).

Norma Hull and Emily Bryson lived at 4116 4th Street, N.W., on the same corner as that near which Mrs. Annie M. Woodson lived (Tr. 66, 77, 94). Shortly after arriving home on the morning of September 1, the two women heard screams[2] coming from the front of Mrs. Woodson's house (Tr. 82-83, 100). Miss Hull called the police, and from a bedroom window she and her cousin saw a police car drive past (Tr. 83, 100). Minutes later the police car reappeared, and as an officer stepped out, the two women saw a man wearing a white shirt and dark trousers run from Mrs. Woodson's porch (Tr. 84, 101). In an alley near Mrs. Woodson's house they identified appellant, then in police custody, as the man who had approached them earlier that morning (Tr. 85-86).

Mrs. Woodson, a cook at the Veterans Administration Hospital where she had worked since 1949, "almost" owned the house at 403 Upshur Street, N.W., and had lived

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[1] Neither young lady had drunk any alcoholic beverages.

[2] Miss Hull testified, "There was a scream of like distress, moaning sound like someone was being . . . hurt". (Tr. 83.)

there for fourteen years (Tr. 113). At 2:30 a.m. on September 1, having been driven home from a birthday party[3] by a Mr. and Mrs. Crawley, Mrs. Woodson ran from their car to her front door (Tr. 114-115). Picking up a potted plant she intended to carry inside,[4] Mrs. Woodson saw appellant standing on the corner near a street light (Tr. 115, 123). She opened the screen door but could not get the key in the inner door, though she "tried and tried" (Tr. 116). When she turned around, appellant was standing at the top of the steps (Tr. 116). Asked what he wanted, appellant replied, "You know what I want." (Tr. 116.)

Appellant advanced closer, and after pulling off Mrs. Woodson's blouse, he began to strike her. She threw the flower pot at him, then "[fought] him with [her] keys," marking his face and neck (Tr. 116-117, 121). She cried out constantly until he seized her throat, thereby restricting her breathing. She "kept on fighting," crying out whenever he lessened the pressure (Tr. 117-118). Striking her vehemently, he pulled down her slacks and forced her to lie on the porch (Tr. 118, 122). After initially failing to effect penetration, his hands clutching her throat, appellant forced the complainant to assist him and had intercourse with her (Tr. 118-119). Mrs. Woodson testified that she could feel appellant's penis inside her and subsequently suffered soreness in the lower part of her stomach (Tr. 123, 129). During the act of intercourse, Mrs. Woodson saw a police car drive past on Upshur Street, after which appellant said, "We are going in the house." After she indicated she would not cry out, appellant allowed Mrs. Woodson to stand up (Tr. 119-120). Fifteen to twenty minutes had now elapsed since she was first accosted by appellant (Tr. 102, 120). See-

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[3] When asked by the prosecutor if she had had anything to drink at the party, Mrs. Woodson replied, "I don't drink." (Tr. 114.)

[4] Steps ascended to a porch where the plant had apparently been sitting (Tr. 122).

ing a police car as she arose,[5] Mrs. Woodson cried out, whereupon appellant, using both hands, knocked her down (Tr. 120).

Mrs. Woodson's final cry for help was heard by Officer Maurice Hall of the Metropolitan Police. Officer Hall testified that at 2:33 that morning he responded to the intersection of 4th and Upshur Streets and, after searching the immediate area and finding nothing, canvassed the general vicinity in his scout car (Tr. 154-155). Four minutes later he returned to 403 Upshur Street, heard a scream and saw appellant in the beam of his spotlight running from Mrs. Woodson's porch west on Upshur Street (155-156). Hall, who was in uniform, identified himself as a police officer and chased appellant to the entrance of an alley thirty feet from the complainant's house. There appellant was apprehended by Officer Ralph Patterson (Tr. 155-156). He was taken back to 403 Upshur Street and was there identified by Mrs. Woodson, who was still on the porch wearing slacks and a brassiere, as the man who had raped her (Tr. 121, 159). When apprehended, appellant was perspiring heavily, and his clothes were disarranged; he had lacerations about his face and neck and blood on his shirt (Tr. 121, 147, 159). He did not appear to have been drinking (Tr. 159).

Appellant testified that he drank a substantial amount of liquor during the hours preceding the offense; that at about 1:30 a.m. he went to a night club on Georgia Avenue, N.W., where he met a girl; that after he walked her home, his neck was scratched in a fight with "some dude"; and that subsequently he was arrested as he walked down the street (Tr. 301-304). He further testified that he saw Mrs. Woodson for the first time after he was arrested (Tr. 326-328).

At trial it was stipulated that if Dr. Allen Beck of D.C. General Hospital were called, his testimony would be that an examination of Mrs. Woodson, conducted at

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[5] At this time Mrs. Woodson pulled up her slacks, which had elastic around the waist and no belt (Tr. 122).

4:35 a.m. on September 1, 1968, "revealed that she had a bruise on her skull and the skin of her neck was broken and bruised, and that she had a scrape on her elbow." (Tr. 145.) No hymen was found, and testing revealed no sperm in the vaginal area. Mrs. Woodson's mental health was found to be normal. In response to the question, "In your opinion is the above evidence compatible with forced vaginal intercourse?", the doctor indicated he was unable to determine (Tr. 145).

In addition to the instructions set forth in appellant's brief,* the trial court further charged the jury:

> Unless you find that the testimony of the complainant, as corroborated, and the other evidence in the case, when taken as a whole establish beyond a reasonable doubt all the essential elements of the offense, you must find the defendant not guilty. (Tr. 620-621.)

ARGUMENT

The evidence sufficiently corroborated the complainant's testimony that appellant had sexual intercourse with her.

(Tr. 116-121, 128, 145, 147, 156-159, 619-621.)

In this jurisdiction, the testimony of a complainant alleging rape must be corroborated to sustain a conviction. *E.g.*, *Carter* v. *United States*, 138 U.S. App. D.C. 349, 427 F.2d 619 (1970); *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942), *cert. denied*, 318 U.S. 776 (1943). This requirement is met whenever there are "circumstances in proof which tend to support the prosecutrix' story." *Ewing* v. *United States*, *supra*, 77 U.S. App. D.C. at 17, 135 F.2d at 636; *accord*, *United States* v. *Terry*, 137 U.S. App. D.C. 267, 422 F.2d 704 (1970); *Bailey* v. *United States*, 132 U.S. App. D.C. 82, 405 F.2d 1352 (1968); *Borum* v. *United States*, 133 U.S. App. D.C. 147, 409 F.2d 433 (1967), *cert. denied*, 395

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* See Tr. 619-620.

U.S. 916 (1969); *Thomas* v. *United States*, 128 U.S. App. D.C. 233, 387 F.2d 191 (1967); *Kidwell* v. *United States*, 38 App. D.C. 566 (1912). The primary purpose of such evidence is to prevent conviction based upon a fabricated charge, and thus "[t]he need for corroboration depends upon the danger of falsification." *Thomas* v. *United States*, *supra*, 128 U.S. App. D.C. at 234, 387 F.2d at 192.

"[A]ny evidence, outside of the complainant's testimony which has probative value—any evidence which could convince the trier of fact that the crime was committed" may corroborate the *corpus delicti*. *United States* v. *Terry*, *supra*, 137 U.S. App. D.C. at 270, 422 F.2d at 707. The risk of fabrication depends upon such factors as the complainant's age[7] and sex, whether there existed a previous relationship between the complainant and the defendant,[8] and whether the accused contested at trial the complainant's allegation that the offense was committed. *United States* v. *Terry*, *supra*. The sufficiency of corroborative evidence necessarily depends upon the circumstances of the individual case. *Bailey* v. *United States*, *supra*.

In the case at bar appellant, while fleeing, was apprehended thirty feet from the scene of the offense and was shortly thereafter identified by the complainant and two other witnesses (Tr. 156-159). The complainant, during her fifteen-minute ordeal, fought desperately until subdued and even then seized her first opportunity to escape notwithstanding the attendant risk of further harm (Tr. 116-121). Her cries for help were heard by at least three persons, and both she and appellant exhibited disarranged clothing and physical injuries immediately after the offense was committed (Tr. 121, 145, 147). A lady forty-seven years old with substantial community ties, the complainant had no motive to falsify her testimony, and

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[7] *See, e.g., Allison* v. *United States*, 133 U.S. App. D.C. 159, 409 F.2d 445 (1969).

[8] *See, e.g., United States* v. *Bryant*, 137 U.S. App. D.C. 124, 420 F.2d 1327 (1969).

appellant did not deny that the offense was committed.[9] Her testimony that penetration did occur and that she subsequently suffered soreness in the lower part of her stomach was clear and unequivocal.[10] Far less compelling circumstances have been held by this Court to have sufficiently corroborated the *corpus delicti* of a sex offense. *E.g.*, *United States* v. *Bryant*, *supra*, note 8; *Bailey* v. *United States*, *supra*.

Ignoring the abundance of other corroborative evidence, appellant argues that because the medical report in the case at bar was inconclusive, the Government failed to corroborate the complainant's testimony that penetration occurred.[11] It is well established, however, that a complainant's testimony regarding the act of sexual intercourse may be sufficiently corroborated by non-medical circumstantial evidence. *Washington* v. *United States*, 136 U.S. App. D.C. 54, 419 F.2d 636 (1969);[12] *Bailey* v.

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[9] The Government's case as to identity was exceptionally strong, so that appellant could have contested the complainant's testimony that penetration had been achieved with minimal tactical disadvantage. *See United States* v. *Terry*, *supra*.

[10] The complainant's testimony at the preliminary hearing held September 24, 1968, as cited on page 3 of appellant's brief, was given in response to the question, "What makes you certain that he made penetration after that?" (Tr. 128.) Mrs. Woodson's response was patently directed toward recounting the sequence of events incident to the rape and in no way indicates any doubt in her mind as to whether penetration was effected.

[11] Appellant's argument that the Government's case was critically deficient because the complainant had pulled up her slacks when first observed by the police, and appellant had done likewise before running from the porch, deserves little comment. It suffices to note that the evidence found lacking by appellant would have been of far less corroborative force than that actually presented.

[12] Though appellant attaches importance to the fact that in *Washington* the complainant's tampon was displaced, it is of much greater significance that although the medical evidence in *Washington* was, as in the case at bar, inconclusive, this Court held that the complainant's screams, her disarranged clothing, and her prompt report sufficiently corroborated her testimony that she had been raped. *See Borum* v. *United States*, *supra*. Indeed, the displaced tampon and inconclusive medical report in *Washington* indicate the high quantum of evidence which physicians regard as prerequisite to a conclusive medical opinion.

United States, supra; United States v. *Fuller*, 343 F. Supp. 203 (D.D.C. 1965), *aff'd*, 132 U.S. App. D.C. 264, 407 F.2d 1199 (1968) (*en banc*), *cert. denied*, 393 U.S. 1120 (1969); *cf. Borum* v. *United States, supra.* Such evidence was most recently found adequate in *United States* v. *Huff*, D.C. Cir. No. 22,344, decided March 8, 1971, where this Court held the complainant's testimony that she had been raped was sufficiently corroborated despite the absence of sperm on her clothing or medical evidence of penetration.

In appraising the sufficiency of evidence to support a conviction for a sex offense, this Court has noted an intent to "steer between the Scylla of a corroboration requirement incapable of attainment and the Charybdis of gutting the corroboration safeguard." *Coltrane* v. *United States, supra*, 135 U.S. App. D.C. 295, 298, 418 F.2d 1131, 1134 (1969). Appellant's argument in effect demands a conclusive medical report as an absolute prerequisite to a successful rape prosecution. Thus by using a contraceptive device and employing a moderate amount of gentleness in the act of intercourse, one could commit rape with relative impunity, secure in the knowledge that he could not be convicted for that offense. The law does not lead to such an absurdity.

In the case at bar, the corroborative evidence was particularly strong and the risk of falsification virtually nonexistent. The Government's evidence establishing rape was more than sufficient, and appellant's conviction should be affirmed.[13]

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[13] We regard as meritless appellant's argument that the trial court failed to instruct the jury with sufficient explicitness as to the need for corroboration. The court instructed that penetration was an element of the offense charged and that, to the extent the complainant's testimony was not corroborated, it could not be considered as evidence. Moreover, the court's instructions made it clear that the jury was to determine whether the complainant's testimony was sufficiently corroborated (Tr. 619-621). The instructions were explicit and complete and certainly did not constitute plain error, particularly in view of the considerable strength of the corroborative evidence. *United States* v. *Bryant, supra.*

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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